United States Court of Appeals

for the Second Circuit

APPENDIX

76-1010

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

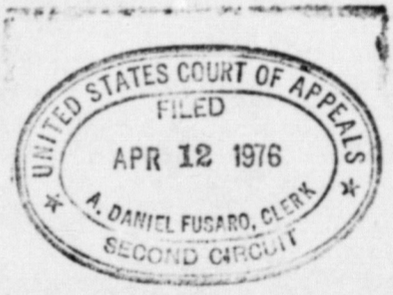
GABRIEL OCHOA,

Appellant.

Docket No. 76-1010

APPENDIX TO APPELLANT'S BRIEF
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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Of Counsel.

JUDGE KNAPP

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

75 CRIM. 375

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	James E. Nesland, AUSA 791-0071
1. GABRIEL OCHOA-1-3 Sudge Knapp 8-5-75	
2. ESSAU CORREA-1-3	
3. DARIO VALENCIA-1-3 7-2-75	
4. LUIS OSORIO-1-3 Not Custy 6-16-75	
5. JOHN DOE, a/k/a Carlos Uribe-1	
	For Defendant:

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
(07)						
J.S. 2 mailed	Clerk					
J.S. 3 mailed 3,4,1	Marshal					
Violation	Docket fee					
Title 21						
Sec. 846,812,841(a)(1),(b).						
Consp. to viol. Fed. Narc. Laws.(Ct.1)						
Possess. w/intent to distr. Cocaine,II.(Cts.2&3)						
(Three Counts)						

DATE	PROCEEDINGS
4-11-75	Filed indictment.
4-15-75	Defts. Ochoa,Correa, Valencia and Osorio(Attys. present) Plead not guilty. Motions returnable in 10 days. The above defts. cont'd remanded in lieu of bail fixed by Mag. $50,000. cash or surety as to all defts. Case assigned to Judge Knapp for all purposes, Bonsal,J.
05-14-75	Filed deft. Gabriel Ochoa's notice of motion re: bill of particulars, suppression, etc. ret: 5-21-75.
05-14-75	Filed deft. Gabriel Ochoa's memo. of law in support of motion docketed this date.
05-14-75	Filed deft. L. Osorio's motion re: particulars and inepection ret. 5-21-75.

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DATE	PROCEEDINGS
05-16-75	Deft. Correa (atty. Louis Tirelli present) deft. (throught an interpreter) withdraws his plea of not guilty and pleads guilty to count 1 only. Pre-sentence investigation ordered. Sentence adj. to 6-26-75 at 4. Bail conditions cont'd. Deft. remanded inlieu of bail. Knapp,J.
05-20-75	Filed Govt.'s memo. of law in opposition to deft. G. Ochoa's motions for relief before trial.
05-27-75	Filed memo-end. on motion docketed 5-14-75. deft. G. Ochoa's motion granted in part and denied. in all other respects as stated this day on the record. Knapp,J. mn
05-27-75	Filed memo-end. on motion docketed 5-14-75. deft. L. Osorio's motion granted in part and denied in all other respects as stated this day on the record. Knapp,J. mn
06-02-75	Deft. Valencia (atty. Sidney Meyers present) deft.withdraws his plea of not guilty and pleads guilty to count 1 only. Pre-sentence investigation orderdd. Sentence adj. to 6-26-75 at 4PM. On the govt.'s appl. bail is revoked and deft.remanded. Knapp,J.
06-17-75	Dario Valencia- application for bail pending sentence is granted with the following conditions: a PRB in the sum of $10,000(unsecured) to be signed by deft. and deft.'s brother-in-law. Deft. is granted permission to sign the PRB today (alone) and have brother-in-law sign the PRB tomorrow(6-18-75) or soon thereafter. Knapp,J.
06-20-75	Dario Valencia- filed remand dated 6-17-75.
06-19-75	Filed Appearance Bond & remand dated 6-17-75 attached for deft. D. Valenciain the sum of $10,000.
Jul 3 1975	Filed transcript of record of proceedings, dated May 16, 1975
6-9-75	Deft. Ochoa(atty. present) and Osario (atty. present) present. Jury trial begun before Judge Knapp.
6-10-75	Trial cont'd.
6-11-75	Trial cont'd.
6-12-75	Trial cont'd.
6-13-75	Trial cont'd. The Court dismisses counts 1 & 3 as to the deft. Osario.
6-16-75	Trial cont'd. Jury retires to deliverate at 1:15PM. Deft. Carrea(atty. present) appl. for reduction of bail granted. Bail reduced to $10,000. P.R.B. secured by $1,000. cash, said bond to be signed by his wife and his uncle. Jury returns with a verdict at 8:50PM. De Ochoa found guilty on counts 1 & 2, not guilty on count 3. Deft. Osario found not guilty on count 2. P.S.I. ordered on deft. Ochoa. Sentence adjourned to 8-6-75. Bail cont'd. deft. remanded in lieu of bail.
6-26-75	Deft. Balencia(atty. present) sentence adj. to 7-2-75 at 9. Deft. Carrea (atty.present) no appearing, b/w issued & sentence adj. to 7-2-75 at 9. Bail revoked. Knapp.
6-27-75	Deft. Ochoa's (atty.present)appl. for reduction of bail is denied. Bail is revoked & deft. remanded. Knapp,J.
7-2-75	Deft. Carrea (atty) not appearing bail in hereby forfeited. Knapp,J.

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DATE	PROCEEDINGS
07-02-75	DARIO VALENCIA (atty. present) Filed JUDGMENT- the imposition of sentence is hereby suspended on count 1 and the deft. is placed on probation for a period of FIVE (5) YEARS subject to the standing probation order of this Court. On deft.'s motion, with the consent of the Govt., the open counts are dismissed. Knapp,J. issued all copies.
*6-18-75	Deft. Esau Corra- application for reduction of bail previously fixed at $10,000. P.R.B. ($1,000. cash) and cosigned by deft. and deft.'s wife and uncle is granted to the following extent: Bail is reduced to $10,000. PRB ($500.) cash. Bond to be signed by deft. and wife only. Knapp,J.
*06-23-75	G. Ochoa-filed CJA 21 appointment of Albert Barron Boyne, interpreter. Knapp,J. issued Copies CJA Clerk.
*06-23-75	G. Ochoa-filed CJA 21 approval for payment of fees of Albert Barron Boyne, Interpreter. Knapp,J. issued Copies CJA Clerk.
*06-26-75	E. Correa-bench warrant issued.
*06-26-75	E. Correa- filed remand dated 6-18-75,
07-15-75	L. Osario- filed CJA 21 appointment of Richard Schoen, Interpreter. Knapp,J. issue copies CJA Clerk
07-15-75	L. Osario- filed CJA 21 approval for payment of fees of Richard Schoen. Knapp,J. issued copies CJA Clerk.
07-15-75	Dario Valencia- filed CJA 21 appointment of Norma S. Seltzer, Interpreter. Knapp,J. issued copies CJA Clerk
07-15-75	Dario Valencia- filed CJA 21 approval for payment of fees of Norma S. Seltzer. Knapp,J. issued copies CJA Clerk
07-23-75	Filed magistrate's orig. papers: docket entry sheet, criminal complaint, disposition sheet, appointments of counsels notices of appearances, temporary commitments, appearances bonds & dismissal slip (as to L. Ochoa & G. Gutierrez)
08-08-75	Filed ORDER for cash bail to be paid to U.S. Treasury- ordered the Clerk of this Court pay out of the registry of this Court to the Treasurer of the U.S. the sum of $50000. Knapp,J. (as to deft. E. Correa)
08-08-75	Filed transcript of record of proceedings dated 6-2-75
08-06-75	GABRIEL OCHOA (atty. present) Filed Judgment-deft. is committed to the custody of the Atty. Gen'l. on counts 1 & 2 pur. to Section 4208(b) of T. 18, U.S. Code, for study, report and recommendations, as described in Sec. 4208(c) of T. 18, U.S. Code. This commitment deemed to be for the maximum sentence prescribed by law, unless altered upon the receipt of the report and recommendations. The results of such study together with any recommendations which the Director of the Bureau of Prisons beleives would be helpful in determining the disposition of this case, shall be furnished to the Court within NINETY (90) DAYS. Prisoner is to remain in the custody of the U.S. Marshal at the Metropolitan Correctional Center until 8-21-75 at which time he is to be turned over to the custody of the Atty. General. Knapp,J. issued all copies.
	9-12-75 Paid U.S. Treas. $500. ck # 6005 dtd 8-12-75.
08-13-75	Filed remand dated 6-3-75.

DATE	PROCEEDINGS
08-14-75	Filed deft. G. Ochoa's notice of appeal from judgment of 8-6-75. Mailed copies to U.S. Atty. and deft. on 8-14-75.
08-15-75	Filed deft. H. Johnpoll's notice of appeal from judgment of conviction, the order denying motion to dismiss information as no penal statute was violated,etc. mailed,copies to U.S. Atty. R. Delegros and deft.
09-03-75	Filed deft. G.Ochoa's notice that record on appeal has been certified & transmitted to the USCA on this 3rd.day of Sept. 1975.
09-29-75	E. Osorio -filed CJA 20 approval for payment of fees of Helena Solleder-Esq. Knapp,J. issued all copies
9-29-75	G. Ochoa-filed CJA 21 appointment of Albert Barron-Boyne-Interpreter. Knapp,J. mailed copies
9-29-75	G. Ochoa-filed CJA 21 approval for payment of fees of A. Barron-Boyne. Knapp,J. issued all copies.
11-24-75	GABRIEL OCHOA (atty. present) Filed JUDGMENT 4 yrs. impr. 18:4208(a)(2) on each of counts 1 and 2 to run concurrently with each other. Pursuant to T. 21,U.S.C. Sec. 841, deft. is placed on 3 yrs. S.P. to commence upon the expiration of the sentence imposed on counts 1 and 2. The court directs that the deft. be kept within the jurisdiction of this court for 1 week to facilitate the appeal of this action. Knapp,J. issued all copies.
12-2-75	Filed G. Ochoa's notice of appeal from judgment of 11-24-75. mailed copies.
12-16-75	G. Ochoa'-filed notice of motion re: reduction of sentence,etc. ret: 12-29-75.
12-19-75	Filed memo-end. on motion docketed 12-16-75. Motion denied. Knapp,J. m/n
12-22-75	Filed notice that the suppl. record on appeal has been certified and transmitted to the U.S.C.A.
12-19-75	Ochoa, G. Filed commitment & entered return, Deft. delivered to M.C.C. 11-24-75.
01-08-76	Gabriel Ochoa-filed Magistrate's temporary commitment.
02-05-76	Filed Magistrate's Papers (acknowledgment of bond after indictment) for deft. Essau Correa: Appearance Bond- $10,000. with $500. deposit as secutity.
02-24-76	Filed transcript of record of proceedings, dated: June 9-11-75
02-24-76	Filed transcript of record of proceedings, dated: June 12, 13 & 16 75
02-24-76	Filed transcript of record of proceedings, dated: June 27-75.
02-24-76	Filed transcript of record of proceedings, dated: August 6-75
02-24-76	Filed transcript of record of proceedings, dated: October 24-75
02-24-76	Filed notice the suppl. record on appeal has been certified and transmi

-cont'd on page 5-

DATE	PROCEEDINGS
03-30-76	Filed notice that the suppl. record on appeal has been certified and transmitted to the U.S.C.A.
04-01-76	Filed notice that the suppl. record on appeal has been certified and trasmitted to the U.S.C.A.

Rev. 5-27-72 [illegible] to distribute narcotic drug.)

Jud:kp

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

-v- : 75 Cr.

CARLOS [illegible], JUAN [illegible], DARIO VALENCIA, LUIS [illegible], and JUAN DOE, a/k/a Carlos Uribe. :

Defendant . :

- -x

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of January, 1975 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, [illegible], DARIO VALENCIA, [illegible], and JUAN DOE, a/k/a Carlos Uribe, the defendant , and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York; and elsewhere:

1. On or about March 4, 1975 defendant DARIO VALENCIA delivered samples of cocaine to an undercover agent.

2. On or about March 6, 1975 defendant DARIO VALENCIA took an undercover agent to 3102 29th Street, Queens, New York to purchase cocaine.

3. On or about March 6, 1975 defendant ROMAN CORREA sold approximately six ounces of cocaine to an undercover agent at 3102 29th Street, Queens, New York for a price of $6,750.00.

4. On or about March 6, 1975 defendants DARIO VALENCIA and JUAN DOE, a/k/a Carlos Uribe, received $6,750.00 from an undercover agent at 30th Street and Broadway, Queens, New York.

5. On or about March 21, 1975 defendants DARIO VALENCIA and ROMAN CORREA met with undercover agents at the El Setio Restaurant, 8823 Roosevelt Avenue, Queens, New York and discussed the sale of kilogram quantities of cocaine to the undercover agents.

6. On or about April 1, 1975, defendant DAVID VALENCIA met with undercover agents at the Shin Shan Palace, 97-05 Horace Harding Expressway, Queens, New York and arranged for the sale of three kilograms of cocaine.

7. On or about April 1, 1975 defendant DARIO VALENCIA received approximately one-half kilogram of cocaine at Eyles Italian Restaurante, 264 West Street, Manhattan, and delivered it to undercover agents.

8. On or about April 2, 1975 defendants GABRIEL OCHOA and LUIS OSORIO delivered approximately two and one-half kilograms of cocaine to undercover agents at 85th Street and York Avenue, Manhattan.

(Title 21, United States Code, Section 846)

USA-33s-527A - IND/INF - Distrib. Possess Narc. Drug (Succeeding Count)
Rev. 5-27-72

COUNT [illegible]

The Grand Jury further charges:

On or about the 2nd day of April, 1973

in the Southern District of New York,

[illegible],
[illegible],
[illegible], and
DARIO VALENCIA,

the defendant s , unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 2,674.7 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

(Succeeding [illegible])

COUNT THREE

The Grand Jury further charges:

On or about the 2nd day of April, 1975

in the Southern District of New York,

CARMEN CUNOA,
LUIS CUNOA,
[illegible], and
DARIO VALENCIA,

the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute, a Schedule II narcotic drug controlled substance, to wit, approximately 436.9 grams of cocaine

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

FOREMAN

PAUL J. CURRAN
United States Attorney

wcl44

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen, as a preliminary matter, you have heard witnesses cautioned about keeping their voices up, and that naturally applies to me too. If any of you have any difficulty in hearing what I say at any time, I would appreciate it if you would raise your hand or indicate it in some way, and if counsel think that anybody is having difficulty in hearing me, I would appreciate it if you would let me know.

First, by way of logistics, what I will do now is give you the instructions of what I believe to be the law that controls your deliberations in this case, and then I will excuse you for a few minutes, ten or fifteen minutes or so, while counsel for either side have an opportunity to make suggestions or changes or criticisms, anything they think I may have left out or should have said differently. After I have considered what they have had to say, I will call you back, give you a few housekeeping instructions and in any event make any changes that I think come from either side or from any of the three lawyers that ought to be made.

So when I send you back, send you out to the jury room after the charge, it will be the last time I will say, "Don't form or express any opinion." But even though it is only for a short time, and even though I expect there

won't be any material change, because after all I think I am going to do it right the first time, I am no more infallible than anybody else, and it may very well be that counsel will call to my attention something I said which, although I should have thought of it, will give a different slant to something I said or something additional which might give you an entirely different approach to a particular problem.

First I am going to briefly refer to the issues and then I am going to outline the general principles which the law has developed for your guidance as to how you should determine those issues.

Let me say at the outset I am going to submit the indictment to you in a somewhat unorthodox fashion, in that I am not going to submit the first count first. I am going to submit the second count first.

The indictment, you recollect, has three charges: first, conspiracy; second, the felony of distributing or possessing with intent to distribute the 2-1/2 kilos of cocaine which were in that white tennis bag; and third, the felony of possessing with intent to distribute the half kilo of cocaine which was in the gold station wagon. I am going to submit those counts in order of, first, the second count, first I am going to submit to you the second count, which is the tennis bag count; then I

am going to submit the conspiracy count; and then the gold station wagon count.

You recollect that I have told you that the conspiracy count and the gold station wagon count only relate to Ochoa. The second count relates to both defendants.

So the first question that you will have to decide, under the rules which I will shortly explain, will be: Did these defendants or either of them, in the early morning hours of April 2, 1975, knowingly and wilfully possess with intent to distribute the 2-1/2 kilos of cocaine contained in that white tennis bag? If your answer to that question is in the negative as to either defendant--that is to say, if you have a reasonable doubt on the subject--that is an end of your deliberations as to such defendant. You must acquit him. If, on the other hand, you answer that question in the affirmative as to either or both, you may convict him or them of the second count, which concerns itself with that particular 2-1/2 kilos of cocaine.

Whatever your conclusion is, that ends your deliberations as to Osorio. But if you have convicted Ochoa of the second -- tennis bag -- count, then you should go on and consider whether he is guilty of conspiracy and of the gold station wagon count. And, as I will tell you later, the gold station wagon count depends on the conspiracy count

in the terms I will tell you.

There are rules that the law has provided for your guidance. The first and in this context the most obvious is the one I mentioned to you when you were being selected, namely, that you are here engaged in trying two lawsuits. Each of the defendants before you is entitled to have his guilt or innocence separately considered. Each defendant is being tried before you as a matter solely for the Court's convenience. You have two separate lawsuits before you, and you should consider the evidence separately as to each defendant.

In this context it should be obvious to you that none of the evidence of the events prior to the evening of April 1 has any bearing on the guilt or innocence of the defendant Osorio.

The next cardinal principle, which I have also mentioned, is that it is you who must weigh the facts. Nothing I may say about the facts or you may conceive that I think about them has any relevance whatever. It may surprise you that I don't have to tell you that. Under the federal law I have the power, if I wish to exercise it, to tell you exactly what I think about the facts and exactly what I think about the credibility of the several witnesses, just so long as I make it clear to you that you are not bound by my views on

that subject.

Why do I tell you I have the power to exercise it if I don't intend to use it? Simply for this reason: I want you to understand thoroughly that it is my profound conviction that the jury system only works if indeed the jury totally disregards anything they may think the Judge feels about the facts. So I just want you to realize that I am not telling you this to take care of some formality I have to meet. I am telling it to you because it is my profound conviction that unless you follow this particular instruction, justice may not be done in this case.

As the finders of fact, you will of course be judges of the credibility of witnesses. There is no mystery about how you judge the credibility of witnesses. Every day in your life you have occasion to judge the credibility of people with whom you come in contact. Members of your family, your friends, your business associates, competitors, everybody who speaks to you, wants you to believe what he or she says. And in the course of your daily existence you develop certain criteria or antennae by which you judge the weight you will put on what people are saying to you.

The theory of the jury system is that it is better to have the judgment of twelve persons than of one. After all, if any one person had to make a decision as to the

credibility of these witnesses, he or she would have only one set of criteria, one set of life experiences, to go by. The jury, on the other hand, has twelve such sets. And the law says -- and I agree with it -- that a sounder result is reached if twelve of you pool your common experiences in making your decision.

Of course, that only works if you do what the law contemplates, namely, discuss the matter with each other, so that each of you, with an open mind, can get the benefit of the experience and judgment of the others.

Incidentally, your function in this regard is the rule that your recollection of the facts controls. What I may remember or what counsel may remember is wholly immaterial. It is your recollection that controls, and if you have any question about anything that seems important to you, you can have the stenographer read back pertinent parts of the testimony. Even then, if you disagree with what the stenographer reads back, your recollection controls. We are all fallible. You are fallible too. But the law places the responsibility on you. So if your recollection is different from what the stenographer has done, you have just got to assume the stenographer made a mistake.

As I say, we are all fallible, the law places the responsibility on you, and you must make the decision.

That does not of course mean that you should arbitrarily disregard what the stenographer has said. But if, after having given consideration to the fact that he was writing it down as it came, you still disagree, you have the responsibility and you have to make the decision.

In talking about responsibility as between various people here, one thing that is exclusively my responsibility and not yours is what, if any, punishment these defendants or either of them should have in the event you find him or them guilty. The law imposes that obligation on me in the event you find guilt.

I trust you to find the facts, and you must trust me to deal with any responsibility that your verdict may impose upon me.

The law has certain guidelines. One is that you are entitled to take into account the interest that any witness may have in the outcome of this action. To start off, a defendant obviously has an interest. He wants an acquittal. That is his interest. The defendants, on the other hand, claim that various of the Government witnesses, including the Government agents, Assistant United States Attorney Nesland, and Mrs. Seltzer, had a professional interest in the outcome of this case which might have given them a motive to falsify, and that you should regard them as

wc151 Charge of the Court

interested witnesses.

The point is that it is for you to say whether and to what extent any witness has an interest in the outcome of the case and, if so, whether and to what extent such interest has influenced his or her testimony before you.

Obviously, you don't just reject a witness out of hand because he or she may have an interest, but you consider the extent of such interest and decide what effect, if any, it had on the testimony.

Isn't that what you do in everyday life? Most people who talk to you have an interest in having you believe what they say. Otherwise, by and large, they would not bother to say anything. In everyday life you take their interest into account in evaluating what they tell you, and that is precisely what you do in the jury room.

Substantially all the Government's evidence came from a police officer of one sort or another. As I told you when you were being selected, the testimony of a police officer or of an Assistant United States Attorney is to be judged in exactly the same way as you judge the testimony of any other witness. How did the witness appear to you on the stand? Did he seem candid? Was he forthright in answering questions, especially on cross-examination? Did he appear to you to be trying to influence the outcome of the

case or merely to be trying to tell you truth as he saw or remembered it, he or she? Did he or she have an opportunity accurately to observe what he or she was talking about? In sum and substance, did he or she appear to you to be the kind of person and to give the kind of testimony upon which you would rely in making important decisions in your daily life?

Then there is another rule of general application, which is that if you find that any witness who has testified before you has deliberately lied on a material matter -- that is, an important matter; "material" means important to the issue to which the witness was addressing him- or herself at the time of the testimony -- if any witness has deliberately lied on a material matter, you may, if you wish, reject and disregard everything that particular witness has said, but you are not required to do so. You may reject part of his or her testimony that you find to be untruthful and accept and act upon such part as you find to be truthful.

Again, that is just common sense. In your ordinary experience some person may have told you a lie and you may say to yourself, "I am never going to believe anything he or she may ever say again. Life is just too short to be bothered by trying to sort out truth from falsehood as far as that particular person is concerned." On the

other hand, you may, after some person has told you even some outrageous lie, consider the motives which caused the person to lie and conclude that in the future you would believe him or her if you found such motives did not exist.

Like anything else, you must act in the same commonsense way in the jury room as you would act in your daily lives.

Of course, this rule only applies to testimony that is wilfully false. It has no application to a mistake which a witness may have made, and that again is common sense.

Another rule for your guidance that I mentioned to you when you were being selected is that the indictment in this case is no evidence whatever. That is not for your guidance. That is a rule of law that you are bound by. The indictment in this case is no evidence whatever of the defendants' guilt or of any fact asserted in the indictment. As I told you then, it has no more probative value than if you see Mr. Iason call in the stenographer and dictate the indictment out of his own head, with respect to no guidance at all except his lively imagination. The only thing that counts in this case is the evidence which is before you. By evidence I mean the testimony which you find to have been reliable.

Let me turn to character or reputation testimony.

Several witnesses were called who testified to Gabriel Ochoa's good character. You should consider evidence of character or reputation together with all other facts, all other evidence in the case, in determining the guilt or innocence of that defendant. Evidence of good character may in itself create a reasonable doubt, where without it no reasonable doubt would have existed. But if, on all the evidence, you are satisfied beyond a reasonable doubt that the defendant is guilty, a showing that he had previously enjoyed a reputation of good character does not justify or excuse the offense, and you should not acquit a defendant merely because you believe he is a person of good repute.

This brings me to the question of reasonable doubt. Let me define that term for you. The words really define themselves when you analyze them. The words define themselves. And it is a burden which is placed on the Government only in a criminal case. It applies in no other kind of a case. When you analyze it, that makes common sense. In a civil case all the plaintiff has to do is to establish his case by what is called a preponderance of evidence, which boiled down means that it is more likely than not that what the plaintiff is asserting is true. And if the jury is satisfied of that, they are entitled to give the plaintiff his verdict.

Now, that may be fine, and indeed it is fine, when all that is involved is whether A should pay B some money. But the purpose of the Government in bringing a criminal case is, among other things, to authorize the Court to commit the defendant to jail. Whether I do or not is my responsibility. That responsibility is not yours. And our liberties would not be worth much if it were possible to put a man in jail simply because his guilt seemed more probable than his innocence.

Therefore, the law says that guilt must be established beyond a reasonable doubt. There are two words in that definition, "reasonable" and "doubt." The meaning of "doubt" is self-apparent. The word "reasonable," in the last analysis, is equally self-defining. It means a doubt for which you can give a reason. It is not just a fanciful doubt or an excuse for ducking a disagreeable duty.

Nobody likes to be in the position of convicting a fellow human being. But the law would also be in a sorry state if jurors would not take the responsibility of finding guilt where it is established beyond a reasonable doubt.

Also, the "reasonable" part of the term goes to the essence of jury deliberations. If one of you has a doubt and expresses a reason for it, and another juror has no doubt, the expression of the reason for your doubt will

probably do one of two things: It will either enable your fellow jurors to demonstrate that your doubt is unreasonable, or it will enable you to demonstrate to him or her that he or she should have a doubt. If you express your doubts or lack of them to each other, you should be able to resolve them one way or the other.

Of course, the doubt, like everything else in this case, the reasonable doubt, must be based on the evidence or lack of evidence; not on something that you may have heard on the outside or some impression or opinion you may have derived from the outside. It has to be based on evidence or lack of evidence. Otherwise how could you discuss it with your fellow jurors?

All that you have in common with each other is what you have heard in this courtroom, and that is the common basis upon which you must base your deliberations.

In this connection I may point out that while it is your duty to discuss your doubts or lack of them with each other and to listen to each other's views, you should adhere to any conscientious opinion which you might hold and not give it up merely for the sake of unanimity. The law simply requires you to do your best to convince your fellow jurors of the correctness of your views and at the same time to listen with an open mind to theirs and to make a conscientious

effort to reach a result which conforms to the conscientious beliefs that each of you holds.

I assume you are not going to start unanimous. Unanimity comes from discussion among you and exploration of your doubts or lack of them, and discussion of the evidence or lack of evidence upon which those doubts or lack of them are based. That is how unanimity is achieved.

Before I leave the question of reasonable doubt, it being so important, let me read another definition that was given by a judge for whom I have great respect. I am quoting from him: "It is a doubt based on reason, which arises from the evidence or lack of evidence in the case. It is a doubt that appeals to your reason, to your judgment, to your common understanding and your common sense. It is a doubt such as would cause you to hesitate to act in matters of importance in your daily lives. But it is not caprice, whim, or speculation. It is not a doubt that a juror might conjure up to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. Let me repeat: It is a reasonable doubt." That ends the quotation.

As you can see, it is not much different from what I said, but I just thought he said it rather well.

Closely related to the doctrine of reasonable doubt is the concept of presumption of innocence. That

means that the Government has the burden of proof in this case and that such burden never shifts. I have told you that the defendant does not have to prove anything. The point is that the presumption of innocence continues in his favor throughout the entire trial and remains there in the jury room until you have finally resolved it, if you ever do, by a verdict of guilty. It means this: Right up to the last minute, your discussion should include the proposition that the Government has the burden, and if the Government has not sustained that burden, that in itself can be the basis of a reasonable doubt.

Before turning to the particular crimes with which these defendants are charged, let me discuss in some detail the testimony concerning statements the two defendants are claimed to have made to Assistant United States Attorney Nesland, which testimony, you recollect, took up most of our day on Friday.

The rules respecting statements made by an accused have carefully been worked out over the years by the courts and the legislature. They may seem confusing to you and it would not be appropriate for me at this time to try to explain to you the whys and wherefores of their various provisions. It is, however, my obligation to try to explain those provisions to you, and your obligation to

apply the law as I lay it down.

Of course, the very first thing you have to decide is whether the statements that have been submitted to you -- either, as in the case of Ochoa, through a document signed by him or, as in the case of Osorio, by Mr. Nesland's recollection of what Osorio had told him -- I thought somebody said something; it is just the interpreter -- were actually made by Osorio and Ochoa, by the defendants, and whether they or either of them understood what they were saying at the time they said it.

Obviously, if you conclude that a defendant either didn't actually say what he is claimed to have said or didn't understand either the statement or the questions in respect to which it was made, you will pay no attention whatever to such statement for any purpose.

In coming to that conclusion, you will of course consider all the evidence you have heard, but perhaps crucial to the question is your appraisal of Mrs. Seltzer. Her testimony certainly must be fresh in your minds. I don't see any purpose in discussing it in any detail.

The question which you have to decide, based on everything you heard her say or heard said about her or observed about her, is: Do you think she was capable of and did make the respective defendants understand the questions

which were being put to them, and, if so, was she capable of and did she accurately translate their answers? If you answer these questions in the affirmative, you then must consider what use is to be made of the statements.

Of course, in considering this proposition you must take into account all the arguments you have heard on this subject, including the argument that Mrs. Seltzer and the defendants came from different cultures. You heard Mrs. Seltzer address herself to that problem, and you heard her testify, and your obligation is to make up your mind: Did she convince you that she explained what was being said to them, and did she understand what they were saying and properly repeat it?

If you come to the conclusion, then, that these statements were understandingly made, you must then consider what use you should make of them. There are two uses you can make of a statement, as I told you at the time they were being given. One, you can use it under some circumstances as evidence against a defendant, and in other circumstances merely as a touchstone for appraising his credibility if he should say something different on the witness stand than he had said previously.

Obviously, the first is the more important use. It is affirmative evidence against him. And before you can

wc161 Charge of the Cou-t

use it for that, you must be satisfied of various things. In the first place, of course, you must be satisfied that what he was saying he was saying voluntarily. He wasn't talking because he was under pressure or any kind of threats were being made to him; he was talking voluntarily. The next thing you must be satisfied of is that he knew the nature of the crime of which he was charged. The next thing you must be satisfied of is that he knew he did not have to say anything if he did not want to, and anything he did say could be used against him if he said it. The next thing you must be satisfied of is that he knew he was entitled to a lawyer if he wanted a lawyer, and didn't have to say anything in the absence of a lawyer and didn't have to keep on talking in the absence of a lawyer.

The next thing you must be satisfied with is that he knew if he did not have enough money to retain a lawyer, the judge -- not me, but the magistrate, who was the next judicial officer he was to see -- would appoint a lawyer for him and the Government would finance such. And if he wanted to wait until all that had been taken care of, either wait until he got his own lawyer or wait until the judge appointed a lawyer for him, he was at liberty to do so.

If you are satisfied that he understood all that -- not merely that it was said to him by somebody, but

that he understood it -- thenyou may consider what he said as affirmative evidence against him. If you are not satisfied with all those things, then you may only consider his statement as a guide for considering his credibility as a witness to the extent that he may have said something different now than he said before.

Now let us come to the specific charges. Count 2, as I have told you, is the count referring to the 2-1/2 kilos that were in that bag. It charges each of the defendants with knowingly and wilfully possessing that cocaine with intent to distribute the same.

Therefore, we have got four different things. Did they possess the cocaine? When I say "they," let us be consistent with what I told you before. I am going to talk separately about each one. Whichever defendant you are thinking about: Did he possess the cocaine? Did he do so knowingly? Did he do so wilfully? And did he do so with intent to distribute?

Rather than give you some abstract definitions of all those words, let me just use some examples. First, possession. If someone that has been here during the entire trial, and therefore has heard the discussion about the cocaine, should pick that bag up with the cocaine in it, and if the cocaine should be in it and they should see it in

there, and carry it over and put it on my desk, at my request, they -- he or she -- during the period of carrying it from there to here would be in possession of the cocaine. It is perfectly simple. It is possession of the bag. And if they had been here the whole time and knew what it was, they would be in knowing possession of the cocaine. So if someone knew the cocaine was in there and picked it up, put it on my desk during the time that they were doing that, it would be a knowing possession of the cocaine.

However, if somebody should walk in from the door, and the cocaine was in the bag and the bag zipped up, and I say, "Listen, Mister, would you be good enough to pick up that bag and put it on my desk," and he came and picked it up and put it on my desk, he would be in possession of the cocaine because he would be in possession of the bag, but he would not know what was in it, so he would not be in knowing possession of the cocaine.

Neither of those supposed people would be in wilful possession, because wilful implies the intent to do something illegal with it, and if all they were intending to do was to pick it up, put it on my desk, at my request or otherwise, they in one case would be in knowing possession if they knew what was in it, in the other case they would be just in possession without knowledge, and in neither case

would they be in wilful possession. Wilful possession is only if they knew it was cocaine and were intending that I or whoever it is that gave it to them were to do something unlawful with it.

When I say "unlawful," I don't mean they have to know they violate any particular statute. They don't have to know the provisions of the drug laws of the United States. They just have to know that it is unlawful, know that it is something that is against the law that they are doing.

Let me put another example. Suppose there were somebody here who had a car parked outside and decides to go home with it. He drives home, and someone without his knowing it has put that bag of cocaine in the trunk. The driver of that bag is in possession of the cocaine, because he is in possession and control of the car in which the cocaine is. But if he does not know the bag is there, he is not in knowing possession of it.

Suppose, further, that somebody is about to drive home and somebody else says, "Hey, you going back by the police station? Would you drop off this cocaine so they could put it in the vault?", and hands him a bag of cocaine. He says, "Yes, I will drop it off in the police station." They put it in the vault. He would be in knowing possession

of the cocaine because he would know he had a bag of cocaine, but he would not be in wilful possession, because what he intended to do with the cocaine was lawful.

But suppose somebody says, "Look, we are going up to such-and-such a place, I have a bag of cocaine which I am trying to sell, would you take this up and give it to Joe Doakes as you pass, because I have sold it to him?" Then that person would be in knowing and wilful possesion of the cocaine, because he was delivering it to Joe Doakes -- provided, of course, that he knew that was unlawful. If he thought Joe Doakes had some lawful reason for having the cocaine, he would not be in possession wilfully. "Wilfully" implies knowledge of evil, knowledge of violation of law.

So your decision is, as to each defendant: Were they in possession of cocaine? There doesn't seem to be much dispute about that. Did they know it was -- he -- I am making the same mistake I tell you not to make. With respect to the defendant you are considering, was he in possession of the cocaine? As I say, there doesn't seem to be much dispute about that. Was he in possession of the cocaine? Two, did he know that the cocaine was in that bag? If he thought it was sugar, if he thought the bag was empty, if he thought it was anything in there except cocaine, that is the end of the matter. Did he know cocaine was in that

bag; and, knowing that cocaine was in that bag, was he intending to deliver it to somebody for an improper purpose, a purpose he knew to be unlawful?

Now, intent technically has to be an intent to distribute, but that more or less in this particular context automatically follows what I have told you. Because the only thing, the only thing, that he could be intending to do with it under the facts in this case was to give it to somebody, namely, the Government agent, who obviously he did not know was a Government agent, or to some other individual, for improper purpose, illegal purpose.

So that is that crime, and I think I have made it clear.

That, as I told you, is the case with respect to the second count, Count No. 2. With respect to Osorio, that is all you have to consider.

With respect to Ochoa, if you acquit him of that, that is all you have to consider also, because that is the end of the case if you acquit him. If you convict Osorio, that is your verdict as to Osorio. If you convict Ochoa of that count, then you proceed to consider whether he is also guilty of conspiracy.

Conspiracy is defined in the statutes of the United States substantially as follows: If two or more

persons conspire to commit any offense against the United States and one or more of such persons does an act to effect the object of the conspiracy, he shall be guilty of the crime of conspiracy. It is very simple.

Let me repeat. If two or more persons, any two, conspire to commit an offense against the United States and one or more persons does an act to effect the object of such conspiracy, he shall be guilty of the crime of such conspiracy.

You can readily see there are three elements of the crime, each of which must be established beyond a reasonable doubt. First, there has to be a conspiracy; second, the object of the conspiracy has to be to commit an offense against the United States,which means to violate a statute of the United States -- and I will just tell you as a matter of law that having cocaine with intent to distribute it violates a statute of the United States; and thirdly, one or more of the conspirators has to do something to effect such unlawful objective.

What, then, is a conspiracy? A conspiracy in ordinary laymen's language is no more or less than a common undertaking entered into between two or more persons to achieve some unlawful objective.

We are always in our daily lives watching people engage in common undertakings. If three of you should

agree to have lunch together and send one of you ahead to the restaurant to reserve a table and put in your orders, you would be engaged in a common undertaking. A common undertaking only becomes a conspiracy, however, if the objective is unlawful.

The first task, then, is to determine whether Dario Valencia, Esau Correa -- I can't pronounce that -- and this man Don Roberto, about whom we have heard so much, and these other people who were involved in this, excluding these defendants now, were engaged in a common undertaking to violate the narcotics laws of the United States. If you decide that they were, then your next question is: Did Ochoa join in that conspiracy?

A conspiracy obviously does not have to be in writing and does not have to have any particular formality attached to it. It is, as I have said, simply a common undertaking. Indeed, all conspirators don't necessarily have to know what the others are doing or have done. What is necessary, however, is that each conspirator knows the existence of the common undertaking, is aware of its unlawful purpose, and intends to further that particular unlawful purpose.

If you are satisfied beyond a reasonable doubt that such a conspiracy did indeed exist, then you should

consider whether the Government established, again beyond a reasonable doubt, that Gabriel Ochoa at some point became a knowing and wilful participant in such a conspiracy. One cannot stumble into a conspiracy by a mistake. A person cannot be guilty of a conspiracy merely because he associates with others who happen to be so guilty.

A person can be guilty of conspiracy only if he knows the common undertaking is afoot, if he knows that such common undertaking has a particular unlawful purpose, and if he wilfully, knowingly and intentionally decides to join in a common undertaking for the purpose of furthering that particular unlawful purpose. I told you about wilfully and knowingly.

Of course, once a person is found to have entered into a conspiracy, it is immaterial whether or not he accomplishes his purpose in doing so or whether he ultimately receives any benefit from his conspiratorial conduct. It should be observed that a conspirator does not have to be aware of all the details of a conspiracy or the conduct of its various members. What is necessary, and without which one cannot be determined a conspirator, is that he have knowledge of the basic unlawful object of the conspiracy -- in this case the unlawful distribution of cocaine -- and that it was his deliberate intent to further

that unlawful objective.

I also mentioned the fact that there had to be an overt act, but in this case that does not concern you much, because one of the overt acts alleged in the conspiracy is the delivery of this particular cocaine in that bag on that morning of April 2, and unless you have already found that overt act to have taken place, you are not considering this problem.

Obviously, from what I have said, it follows that knowledge without wilful participation is not enough, and Gabriel Ochoa had no obligation to expose the conspiracy because he may have known about it. Merely because Gabriel Ochoa may have heard about the existence of the conspiracy does not make him a party to it. He has to wilfully and intentionally decide to participate in it and advance its objectives.

One of the persons the Government claims to have been a member of this conspiracy is that white shoe'd man we heard so much about, who fetched the cocaine from the gold station wagon that evening and then put it back again. That brings into play another rule of law which relates to the third count of the indictment, and that rule is that if you once enter into conspiracy for the purpose of committing a crime and one of your coconspirators does acts which

constitute the crime you have conspired to commit, you are just as guilty as though you did the act yourself.

So if you conclude that Ochoa was a member of the conspiracy, this conspiracy that we heard about in the early days of this trial, in which Dario was involved -- you remember it; I don't need to repeat the details -- if you conclude that Ochoa was a member of that conspiracy, and that white shoes or whatever his name was was also a member of it and was carrying out one of the functions of the conspiracy by going to get the cocaine and bringing it back, then white shoes' possession of that cocaine would be attributable to Ochoa and he would be guilty of the third count in the indictment, namely, possession of the half kilo of cocaine found in the gold station wagon.

Of course, you have to conclude that white shoes knew what was in it -- cocaine; that he had the same mental attitude toward the cocaine that these defendants --

MR. LYON: I am having difficulty hearing you, your Honor.

THE COURT: You have to conclude that white shoes knew what was in it -- cocaine; that he had the same mental attitude in handling it that these defendants had that I told you about in respect to the tennis bag. If you come to those conclusions, then you may convict Ochoa of that

count as well.

Of course, there has been a lot of talk about knowingly and intentionally, but you must understand that knowledge and intention are matters which you must infer. You must infer beyond a reasonable doubt. Before you find them to exist, you must find them to exist beyond a reasonable doubt. But people don't go around with signs on saying, "I notice this and I intend that." You don't get direct evidence of knowledge and intention, but you infer it from all the acts and conduct, all the acts and conduct of the particular individual whose knowledge and intention you are concerned with at the moment. And you must infer, of course, beyond a reasonable doubt.

Incidentally, any time I have told you throughout this trial that you must find a fact, you can just assume that I said that you must find that fact beyond a reasonable doubt. I think I have said it every time. There is no other way you find a fact in a criminal case.

Ladies and gentlemen, I am going to ask you to leave, retire to the jury room, and in five or ten minutes I will send for you. When I send for you, will the alternates bring back anything they may have left in the jury room, including their lunch, because they won't go back in the jury room next time.

(The jury left the courtroom.)

THE COURT: Mr. Lyon first.

MR. LYON: I have no exceptions to the charge.

THE COURT: Any requests?

MR. LYON: Yes, I have some requests.

There was one point when you stated that, referring to the conspiracy count -- and you explained that there had to be some intent involved in intent to distribute, with which I have no argument -- but you said that, of course, under these circumstances the only intent would be the intent to distribute. At that point I think, respectfully submit, that you should have -- and I ask that you do now -- cleared up the fact that, of course, if he knew about the cocaine at that point, then his only intent would be to distribute.

THE COURT: I thought that was clear, but I will certainly make it clear.

MR. LYON: In that regard you mentioned a number of times that the issue is whether he knew that the cocaine was in the bag. Under the facts of this case there is a good part of the case where there is even an issue as to whether he knew that the bag was in the car. And I think that might be a little confusing. The jury might assume that from that that he knew the bag was in the car, and I know that is not

wc174 Requests to charge

your Honor's intent.

THE COURT: I will certainly bring that out.

MR. LYON: And finally, will you explain that the third count, under the Pinkerton rule, he would be guilty of if he is guilty of the conspiracy. I think it naturally follows, but I don't think it would hurt to make it clear that if he is not guilty of the conspiracy, of course the third count falls, just as, if he is not guilty of the second count, the other two counts fall.

THE COURT: I think it follows. It does not make any difference, because if they should bring in verdict of guilt on the third count and not on the conspiracy, I would set it aside.

MR. LYON: I understand. But in all --

THE COURT: I think I have said it enough so as to have it clear, but if I turn out to be wrong it does not make any difference, because --

MR. LYON: I think you said enough that it was clear about the second count, but I don't know whether that Pinkerton is that clear. It was clear to me, I felt, only because we had discussed it before. Those are my only requests.

THE COURT: Mrs. Solleder?

MRS. SOLLEDER: Yes, Judge. I don't know whether

this is a proper request or not. I have no exceptions. Just a request. Should they be told at what point the defendants had to know that there was cocaine in the bag?

THE COURT: What do you have in mind?

MRS.SOLLEDER: I mean, if they discovered it too late for them to do anything, that does not mean that they had the guilty, wilful intent to possess it.

THE COURT: What point do you think they might? What is your theory? I don't like to give academic charges to the jury. What is your theory?

MRS. SOLLEDER: That is the problem, Judge.

MR. LYON: May we have a moment to consult? I think she made a very good point.

(Conference between Mrs. Solleder and Mr. Lyon.)

MRS. SOLLEDER: Judge, as I said in my summation, at the point the bag is opened. If that was the first time they knew that there was cocaine in the bag, then they could not have had all those requisites of wilfulness, knowing possession, intent to distribute, because at that point it was too late for them to do anything.

THE COURT: I am inclined to agree with that.

MR. IASON: The Government agrees with that.

THE COURT: Yes. I will say that.

MRS. SOLLEDER: Now I have a couple of others,

wc176 Requests to charge

Judge. Where you charged about circumstantial evidence, to show knowledge or intent, would you charge that the acts or the words must be such as to be inconsistent with an absence of intent or knowledge?

THE COURT: No. I think I have done enough on that.

MRS. SOLLEDER: The last one I have, Judge, is: I would really like you to explain a little more whether the statement was knowingly and intentionally made with respect to the constitutional rights that this defendant Osorio had.

THE COURT: I said he did not have to talk without a lawyer, did not have to talk without a lawyer the Government paid for.

MRS. SOLLEDER: As his testimony was, he thought the lawyer was there, Judge, and that Mr. Nesland did not-- Mr. Nesland testified that he did not tell him "I am not your lawyer, I am your adversary."

MR. IASON: I think his Honor included in his charge that if the defendant did not understand at the time of his interview what was going on, it was not voluntary. There was something to that effect about understanding in the question of voluntariness.

MRS. SOLLEDER: Just take into consideration his background, his lack of education, his state of mind and body

at that time.

THE COURT: I think I told them all that.

MR. IASON: Your Honor, I think it was already in there, and I think that any restating of it would over-emphasize it and would, in spite of your Honor's admonitions, convey to the jury that you were particularly troubled about that point. I believe that has been stated. I understand your concern, Mrs. Solleder, but I think the Court has already charged on that point and that that is sufficient.

MRS. SOLLEDER: I will withdraw that part that he thought his lawyer was in the room, Judge. I think it would be better not to go into that much detail. But I do feel that the waiver of his constitutional rights should be tested by -- obviously it always has to be tested by what the person's intelligence is.

THE COURT: I think I said it, but I will tell them that you don't think I said it.

MRS. SOLLEDER: I have no further requests.

MR. IASON: Your Honor, I might have missed it, but I did not hear you say anything about duration of the conspiracy, that to be a coconspirator a defendant need not have been in a conspiracy throughout its duration; it is sufficient if you join it at any point before it is concluded.

THE COURT: Let me see whether I said that.

MR. IASON: As I said, your Honor, I think you may have said it, but I didn't hear it.

MR. LYON: I believe that was covered.

THE COURT: Let me see what I have written here.

MR. IASON: I think it is critical in the Government's view of the case against the defendant Ochoa.

THE COURT: No, I didn't say that. I didn't say it.

MR. IASON: The Government would ask that that be included when the jury returns.

MR. IASON: Your Honor, on the definition of conspiracy, as I heard what your Honor was saying, it seemed to me that you were reading from the conspiracy statute in Title 18, section 371, whereas a different statement of the conspiracy statute in a narcotics act seems to me may be more understandable to the jury under the circumstances of this case, which in 371 talks about to commit any offense against the United States, which is as I understood your Honor to be reading. The conspiracy statute in a narcotics section, of course, does not refer to committing any offense against the United States; it speaks more specifically in terms of violating the narcotics laws.

THE COURT: I told them the cocaine -- you are

more alert than other prosecutors, because I have always given that in narcotics cases. If there is a better one --

MR. IASON: I think that is a troublesome one for the defendant.

THE COURT: I told them specifically possession of narcotics.

MR. IASON: I understand that. I am not pushing it. I did think I have an obligation to raise it.

THE COURT: I will look at it next time. No one has ever called it to my attention. It is too late this time. No one has ever called my attention to it before.

MR. IASON: Because the language is substantially different. I think my requests, as I say, for next time may make it clearer as to the way the Government suggests that be handled.

The other one is the one I raised with you on Friday -- I just raised briefly: that the Government would ask for a charge on aiding and abetting. I think that is relevant and may help the jury understand as to a possible theory for the Government, particularly as affecting the defendant Osorio -- as well, though, of the defendant Ochoa.

THE COURT: I may be in error, but I will be consistently in error.

MR. IASON: Again, [illegible] Honor, I just want to

raise that.

I have, I think, one more brief point. On the third count, one of your premises was, I think you said, to find the defendant Ochoa guilty on the third count, to conclude that white shoes knew about the cocaine. I think that that is a legitimate position to take but not one that I necessarily agree with. It is possible that white shoes could have been simply a messenger and he could have been in the position that the defendants here claim, meaning he could have been told, "Go get a package out of the gold station wagon," without knowing what the package was. But if whoever sent him was a coconspirator and knew what was in the package, that of course would be sufficient for the guilt of the defendant Ochoa on that. So it would not be necessary that white shoes knew what was in the package.

THE COURT: That is correct.

MR. LYON: Your Honor, I have no argument with the two points about the duration of joining and Mr. Iason's point about white shoes possibly being only a messenger but on the direction of somebody he knew. My only suggestion is that, if it is repeated now, it could be devastating to the defense unless along with it is the comment that of course they must consider that if he never joined they don't have to worry about the duration of it, and if he didn't know, then

wc181 Requests to charge

that issue does not come up. Just since we are bringing something that might have come in the original charge, I would like that part to come together.

THE COURT: All right.

MR. IASON: Of course, your Honor, that is relevant also with respect to the point that Mr. Lyon made -- frankly, I thought it went without saying -- that bringing them up now may be legitimate, but of course it does emphasize certain aspects of the defense side of the case.

THE COURT: I think you are about even on that.

MR. IASON: Yes, sir.

MR. LYON: I have no objection if when you mention about the third count, you can say that if he is guilty, he can be guilty of the third count, you know, and repeat it, and then say: Of course, if he is not guilty of the conspiracy -- I don't care, as long as we get both sides in. Because on either, I have asked what he has asked, just so it does not look --

THE COURT: There is no objection as to exhibits, I assume?

MR. LYON: Of course not.

THE COURT: If they want any exhibits, they can have them.

MR. IASON: No objection.

MR. LYON: Of course, we mentioned, whether that was on the record or not, but just in the event, as to the statements, that there be a strip on the question of bail.

THE COURT: Yes. I won't tell them about that.

MR. LYON: No, I didn't mean that you did.

MR. IASON: I understand that for the Government, your Honor. That does bring up a point I must raise briefly. You mentioned to the jury about sitting late this evening.

MR. LYON: Suppose they ask for the cocaine.

MR.IASON: With the Court's permission, after 5 o'clock or so at night, I should have this cocaine locked up or else I am going to be --

THE COURT: The cocaine you can lock up right now. They don't get the cocaine.

MR. IASON: Ordinarily, your Honor, the Government is obliged to keep all the exhibits present.

THE COURT: No, the cocaine you can lock up right now. They don't get that, in any event.

(Jury present)

THE COURT: Ladies and gentlemen, I don't think I need to make any changes that are material, but I told you with respect to Ochoa, in fact both of them, that he had to know the cocaine was in that bag, and it was suggested that I might be deciding for you that he knew the bag was in the

car. Of course, I didn't intend anything like that. He has to know the bag was in the car; he has to know about the bag before it is relevant that he knows what is in it. I certainly did not intend to skip over your reasoning in that respect.

One thing that everybody, including the Government, seems to think I might not have been clear on. Everybody agreed that when Mr. Osorio was in the front of the car he opened the bag. That much is agreed upon. I am not going to give the contentions of the parties on either side. But if that was the first time he realized that there was cocaine in it, that would not satisfy his knowledge. I mean, if that for the first time he realized there was cocaine was when he opened it, at that point, that would not be enough in that respect for Osorio, or anybody else.

MR. LYON: The same thing as to Ochoa?

THE COURT: I said as to anybody else, yes.

On the other hand, on the question of conspiracy, it is wholly immaterial when, at what point in the conspiracy -- this applies only to Ochoa, of course -- it is wholly immaterial at what point in a conspiracy a member joins it. It can be at the beginning or at the end, just so long as he joins it for the purpose of furthering its unlawful objective.

But in that connection, of course, I remind you

that in order to join it he has to have the knowledge of what it is all about. In this particular case, before you come to that point, he has got to have had the knowledge of what was in that bag at the time he delivered it.

With respect to the third count, two things. I remind you the third count depends on the conspiracy count. So you cannot, just as you cannot reach the conspiracy count with respect to Ochoa without having concluded he was guilty on the white bag count, so you cannot reach the third count without having concluded he is guilty of conspiracy.

In that connection I also told you that on the rule that permitted you to attribute white shoes' knowledge to Ochoa, that before you could attribute his act to Ochoa, you would have to find that he knew, had the same knowledge and intention that I said these two defendants would have with respect to the tennis bag. But that is only a substitute for Ochoa's knowledge, if you find that Ochoa knew what white shoes was doing. If you find that Ochoa knew what white shoes was doing, then if white shoes had been an innocent messenger, that would not excuse Ochoa. But if you find that Ochoa was a member of the conspiracy, then you would not have to find that he knew what white shoes was doing necessarily, if white shoes had the knowledge. But if you had reasonable doubt as to whether white shoes had the

knowledge, you could still convict Ochoa if you concluded that he did know what white shoes was doing and had his own knowledge and intent with respect to white shoes.

Have I made that clear?

Of course, I again remind you that you don't come to these things unless you find he had the knowledge with respect to that particular bag in the first place, pointing at the white bag.

Now, on housekeeping matters, in the first place your verdict has to be unanimous. There is no such thing as a non-unanimous verdict in a federal criminal case.

Second point: If you want any exhibits, just ask for them and they will be sent in to you. And you will recollect that I told you that the statement which Ochoa signed is evidence only against him and not evidence against Osorio. To highlight that, the Government has produced, will produce, for sending in if you ask for it, a fresh Xerox copy with any references to Osorio left out. That is to highlight the fact that it is only evidence against Ochoa; it doesn't make the thing ununderstandable.

If you want testimony read back, just ask for it.

And of course you won't remember exhibit numbers. Just describe the exhibit. If you want testimony read back, describe what you want and have it read back. But

of course if you want that, don't expect instant replay, because obviously, in the first place, we have to figure out exactly what you mean. The question you will ask will not have been in either counsel's mind at the time they were asking a question, probably. So we have to figure out what you mean, we have to find it, then we have to get agreement between counsel as to what answers your question. If they cannot agree, I will have to decide for them. I may call you in and get more explanation. But all that takes time. Then the stenographer has to get it organized, so he can read it to you. All that takes time. So if you ask for testimony, unless it is very vital and you just can't go on, just put it aside and go on in your deliberations and in due time you will hear from us.

If you want anything in my charge repeated or explained, don't have any hesitancy in asking me. You know, I am an expert in this field, and experts when they talk get in the habit of talking in shorthand. You have heard doctors talking to each other. You haven't any idea what they are talking about. Well, lawyers get the same way. I try in my charges to overcome that and talk to you and express it in language that a layman would easily understand, but it may be that I have not done that.

So have absolutely no hesitancy in telling me:

wc187

"On this question would you please repeat or elaborate?"

One thing I never want you to do in any message you send out to me, and that is tell me how you are standing at any one time on any given issue. The reason for that is obvious when you think about it, but you might not think about it unless I mention it.

If you should tell me that you are deadlocked -- I am not suggesting you are going to be -- but if you should tell me that you are deadlocked, I may think it wise to kind of reason with you as to ways and means of carrying on your deliberation and breaking your deadlock. If I know you are ten to two or eleven to one or something like that, there is no way I can possibly talk to you without giving the two or the one the idea that I want him or them to go over to the majority because I think the majority is right. But if I don't know, then I can talk to you without giving you any impression, because I just am trying to help you achieve unanimity, and if I don't know which is on one side, which is on the other, I am not expressing any views.

So you can tell me you are deadlocked ten to two, if you want to, just so long as I don't know what the ten is and what the two is. I am not suggesting you are going to be deadlocked, but that is just for your information.

I will see counsel at the side bar.

wc188

(At the side bar)

THE COURT: Anything I forgot?

MR. LYON: Judge, on the issue of wilfulness, you mentioned that, as per request, in the event they suddenly got knowledge when the bag was opened, that might be too late for it to be wilful. You limited it to Osorio. I did what I should not have done: I called out from the table and I said: "Does that apply to Ochoa too?"

THE COURT: I said that. I answered you.

(In open court)

THE COURT: Will you swear the marshal.

(The marshal was duly sworn.)

THE COURT: Ladies and gentlemen, I submit the case to you with full confidence that you will do justice between these defendants. The alternates remain seated. The jurors please retire.

(At 1:13 p.m., the jury retired to deliberate.)

THE COURT: Lady and gentlemen, I thank you for your attention. It turned out that we didn't need you. It looked as though we would get one of you there for a while one day. So it was like an insurance policy: you pay the premium and you don't use it. I hope you found it an interesting experience. You are discharged with the thanks of the court.

(The three alternates left the courtroom.)

wc189

(Recess)

MR. LYON: Your Honor, before the jury comes in, was there a second note?

THE COURT: Yes. They want to know if I can give them a copy of my charge.

MR. LYON: Very well. Just that if you would give them a copy of your charge.

THE COURT: Apparently there was a misunderstanding. Bring them in. I understood that the first note was going to be answered.

MR. IASON: Your Honor, maybe Mrs. Solleder and Mr. Lyon would want to find out --

MR. LYON: What is it?

THE COURT: I thought you agreed that we could say that the answer was, there was no evidence.

MR. LYON: We agreed that that was the fact, but we thought that that should be -- I don't know if you have discretion to send it in.

THE COURT: I thought you agreed to send it in?

MR. LYON: No, not that.

THE COURT: Well, I will tell them.

MR. IASON: Your Honor, if there is any request, I have a redacted version now of the statement as well. I just want it taken care of. I have shown it to Mrs. Solleder.

wc190

(At 4:05 p.m., the jury returned to the courtroom.)

THE COURT: Do you have that message you sent out the first time?

THE FORELADY: Yes, I left it inside.

THE COURT: You understand that counsel agree that there was no evidence in the record to answer either of those questions you sent the first time.

Now, the second question you have asked: Is it possible that you have a written copy of the judge's charge to the jury? Well, the first problem with that is, there is none. I had notes from which I spoke, but I have no written copy; and even if there was, it is not the practice to do it. But if there is any specific question you want me to elaborate on, just send out a note and I will elaborate or if you happen to know what it is.

THE FORELADY: We were concerned with which charge we should consider first and second and how you told us the second charge first --

THE COURT: I told you you had to consider first the accusation that the two defendants, or either of them, were guilty of knowingly and wilfully possessing the cocaine which was contained in the white bag. And if you were satisfied that either or both of them knowingly and wilfully

wc191

possessed that cocaine, you should convict of the second count of the indictment, which is the count that alleges that knowing and wilful possession.

If you acquit on that, that is the end of the case as to all defendants or as to the ones you have acquitted. You could acquit either of the defendants, and that is the end of the case as to that defendant. If you convict, on the other hand, Mr. Ochoa on that count, you may go on and consider whether or not he is guilty of conspiracy. If you find him guilty of conspiracy, you can go on and consider whether or not he is guilty of the second gold --

THE FORELADY: Station wagon.

THE COURT: -- station wagon count. Does that clarify it?

THE FORELADY: For me, your Honor.

THE COURT: Yes. The confusion is that you consider the second count first.

THE FORELADY: That was our confusion.

THE COURT: It is the second count in the indictment but the first count to consider.

THE FORELADY: To be considered.

THE COURT: That is why I tried to call it the tennis bag count rather than the first count. First consider the tennis bag count, then consider the conspiracy count, and

wc192

then consider the gold station wagon count.

THE FORELADY: All right.

MR. LYON: Your Honor, may we approach the bench.

(At the side bar)

MR. LYON: Your Honor, I know you have said a number of times that if you acquit on the second count that you aren't to consider the first, it is the end of the case. I don't know if that is clear to them. In other words, if you acquit on the second count for either of them, that person is acquitted of the entire case.

THE COURT: If it isn't clear to them and they acquit on that and convict on anything else, I will set it aside.

MR. LYON: But they may be working for nothing. Because I see, you know, they did fail to remember. It is not easy to remember all of these things.

THE COURT: I think they have it clear.

(In open court)

THE COURT: Ladies and gentlemen, you may resume.

(At 4:10 p.m., the jury left the courtroom.)

(At 6:45 p.m., the jury returned to the courtroom.)

THE COURT: Ladies and gentlemen, I take it

wc193

you are not about to come up with a verdict and you must be hungry. So I am going to send you out to dinner.

Just bear in mind that you will be in the custody of the marshals, and the marshals are no more likely to know what you are thinking than I am or counsel for either side. So while you are away, don't discuss the case at all while you are in the company of the marshals.

And, beyond that, there must be some tension building up in the process of discussion. So use the opportunity to relax the tension. If you have been arguing with each other, don't sit next to the person you were arguing with.

(At 6:50 p.m., the jury left the courtroom.)

CERTIFICATE OF SERVICE

April 12, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York and to appellant Ochoa.

Phyllis Skloot Bamberger